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ABSTRACT

The Chicago (Illinois) Board of Education has been engaged in a process of system-wide reorganization that may shift the locus of decision-making authority for many administrative functions from the Central Office to individual schools. Proponents of decentralization contend that restructuring will reduce costs and increase efficiencies at the Chicago Public Schools. Decentralizing the school district's purchasing process raises serious questions as to how the school system's Minority and Women Business Enterprise Program (M/WBE) can continue to operate and succeed in achieving its goals. This study examines the potential impact of the decentralization of purchasing on the M/WBE program, an affirmative set-aside program designed to increase access to government contracting opportunities for minority- and women-owned businesses. Court rulings have stipulated that for an M/WBE program to be constitutional, it must include race- and gender-neutral policies, be narrowly tailored, and administered in a flexible manner. An increase in decentralized purchasing may strain the ability of the district to operate the policies that are necessary to a constitutional M/WBE program because it may affect the four race- and gender-neutral remedies that have been defined for the current program: (1) accelerated vendor payments; (2) reduced bonding, bid deposit, and insurance requirements; (3) debundling of larger contracts; and (4) technical assistance. (SLD)

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Chicago Urban League
Department of Research and Planning

Maintaining Set-Aside Programs Under School Decentralization

A Review of Legal Mandates

Joseph S. Moag
Nikolas C. Theodore

U.S. DEPARTMENT OF EDUCATION
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INTRODUCTION

The Chicago Board of Education has been engaged in a process of system-wide reorganization that may shift the locus of decision-making authority for many administrative functions from the Central Office to individual schools. Such a shift would profoundly alter the organizational structure through which administrative functions are carried-out by the District. The call for some form of school decentralization has come from many quarters of the reform community. While the primary goal of reform proposals is improving the delivery of educational services, proponents of decentralization contend that restructuring will reduce costs and increase efficiencies at the Chicago Public Schools.

Decentralizing the District's purchasing process raises serious questions as to how the Chicago Public Schools' Minority and Women Business Enterprise (M/WBE) Program can continue to operate and succeed in achieving its goals. Specifically, this paper will examine the potential impact that decentralization of the District's purchasing process may have on the continued legality of the District's M/WBE Program, and thus the impact that decentralization may have on the District's ability to continue to improve M/WBE access to purchasing opportunities.

M/WBE PROGRAM LEGAL MANDATES

State and local affirmative action set-aside programs (M/WBE Programs) are procurement programs designed to increase access to government contracting opportunities for minority- and women-owned businesses. M/WBE Programs, including the one operated by the Chicago Public Schools, have shown measurable success in increasing minority- and women-owned businesses' access to contracting opportunities.

The shape and scope of contemporary set-aside policies are primarily governed by Supreme Court and federal court rulings. A number of set-aside programs have been reviewed by the courts over the past three years. One result of this process has been the development of generally accepted constitutionally permissible M/WBE Program policies.

Three court cases in particular have had a profound affect on the shape of current M/WBE Programs. The Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*,[1] and subsequent federal court rulings on the constitutionality of M/WBE Programs (*Cone Corporation v. Hillsborough County*[2] and *Coral Construction Company v. King County*[3]) have developed a "three-pronged" test for determining the constitutionality of an M/WBE

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[1] *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

[2] *Cone Construction v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990).

[3] *Coral Construction Company v. King County*, 941 F.2d 910 (9th Cir. 1991).

Program such as the one operated by the Chicago Public Schools. The *Hillsborough* decision outlined this test by pointing out that the *Croson* decision,

> "...provided a stringent burden of proof for proponents of MBE laws to meet - they must be able to show that there were actual instances of past discrimination, that the MBE plan is necessary to remedy the discrimination, and that the plan is narrowly tailored to that goal."[4]

The first "prong" of the test relates to the need for a state or local government to establish an *a priori* case that discrimination has indeed limited opportunities for M/WBEs in contracting. In the case of the Chicago Public Schools, the District has cleared this hurdle by developing and publishing its predicate study.[5]

The second and third "prongs" of the test for determining the constitutionality of an M/WBE Program like the District's relate to the operation of the Program itself and the degree to which the program establishes remedial operating policies, including whether or not these policies are narrowly tailored.

The District's M/WBE Program has developed these final two components of a constitutionally permissible M/WBE Program. However, as will be shown, decentralization of the purchasing process will prevent the Chicago Public Schools from operating an M/WBE Program that meets the requirements of flexibility and narrow tailoring. Absent such operating policies, the District's M/WBE Program would likely be found unconstitutional.

Remedial Operating Components: Race- and Gender-Neutral Remedies

In an effort to reduce undue burdens on nonminority-owned firms that may be imposed by M/WBE Programs, Justice O'Connor, writing for the majority in *Croson*, mandated the implementation of race- and gender-neutral remedial measures by local governments. Such measures should be directed at assisting the small business sector in general in overcoming obstacles to government contracting. It is anticipated that race- and gender-neutral remedies will predominantly benefit minority- and women-owned firms.

The Chicago Public Schools have included four race- and gender-neutral remedies as part of the current M/WBE Program: 1) accelerated vendor payments; 2) reduced bonding, bid deposit, and insurance requirements; 3) de-bundling of larger contracts; and 4) technical assistance.

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[4] *Cone Construction v. Hillsborough County.*

[5] Board of Education of the City of Chicago, *Report Concerning Consideration and Adoption of the Revised Remedial Plan for Minority and Women Business Enterprise Economic Participation*, January 30, 1991. Predicate studies document the existence and nature of the discriminatory environment.

Accelerated Vendor Payments

Historically in Chicago, efforts by many minority- and women-owned firms to conduct business with local governments have been hampered by the problem of slow payments. Slowness in the delivery of payments places a strain on the cash flows of small firms and limits the ability of firms to participate in other contracting opportunities. Slow payments may be the result of delays in agency accounting processes or in delays by prime contractors. The District has recognized that slow payments are often a serious barrier for smaller firms wishing to do business with the District. Therefore, the District's M/WBE Plan has specifically called for payment acceleration to vendors. As M/WBEs are typically smaller in size than majority-owned businesses, and thus more likely to suffer from slow payments, the policy of accelerating payments will greatly benefit M/WBEs.

Reduced Bonding, Bid Deposit, and Insurance Requirements

Because sureties are often reluctant to insure small firms, these firms have difficulty meeting bonding, bid deposit, and insurance requirements imposed on larger government contracts. The District, recognizing that the inability to secure surety bonding is a barrier to participation in government contracting by small firms, has implemented policies which allow for reducing bonding, bid deposit and insurance requirements. As M/WBEs are typically smaller in size than majority-owned businesses, and thus more likely to suffer from these constraints, bonding policies will benefit M/WBEs.

De-Bundling of Larger Contracts

Smaller businesses have a difficult time gaining access to government purchasing opportunities because large contract sizes place contracts beyond the capacity of small firms. In recognition of this fact, and in order to increase participation of small firms in District purchasing, the District's M/WBE Plan states that the Purchasing Department will divide some larger contracts into smaller units (de-bundled) to allow for bidding by smaller firms. Minority- and women-owned businesses are typically smaller in size than majority-owned businesses. Therefore, de-bundling of larger contracts will benefit M/WBEs.

Technical Assistance Policies

Small firms often find government contracting to be a cumbersome and difficult undertaking. The District recognized this fact and has included technical assistance policies in its M/WBE Program. These policies are designed to facilitate access to the District's purchasing process. Technical assistance includes providing information on District purchasing procedures, evaluating unsuccessful bids, and assisting vendors in obtaining bonding and insurance. As M/WBEs are typically smaller in size than majority-owned businesses, and thus more likely to require proactive assistance to assure involvement, technical assistance policies are an important aid to M/WBEs.

Impacts of Decentralization: Race-Neutral Remedies are Scale Economy Requisite

The District as a whole has the capacity to implement the above race-neutral remedies for one important reason -- the District has achieved a level of cash flow and scale economies that allow it to implement measures to remedy the imperfections that exist in the market due to discrimination.

An example of how the implementation of race-neutral remedies is based on financial position can be seen in the area of bonding and insurance. Financial institutions are often reluctant to make capital available to M/WBEs. Often this decision is based not on objective evaluations of risk, but rather, on subjective evaluations of the race or gender of a firm's ownership.[6] Many government contracts must be bonded to assure performance. Therefore, without access to bonding, minority- and women-owned firms are denied access to government contracts.

Because the District is able to balance the risk associated with non-performance of a contract against the resources available at the District level, the District is able to offer bonding and insurance reductions or waivers to encourage participation by minority- and women-owned businesses. Local schools operating as stand-alone entities, on the other hand, are not capable of absorbing such risk. Attempting to absorb risks associated with granting bonding reductions or waivers would expose too great a percentage of a school's resources to covering contract non-performance, thereby jeopardizing a school's financial position.

If procurement, and likewise Affirmative Action, were to come under the operational jurisdiction of local schools, local schools would not be able to carry out needed race- and gender-neutral set-aside policies. Without these policies, an M/WBE Program's legal status becomes questionable.

Narrowly Tailored Policies

Certification

The Supreme Court's *Croson* decision stipulates that the remedies contained in a local government M/WBE Program be narrowly tailored to address only the specific discrimination found in a predicate study, with the Program's protections extending only to those classes of firms found to have suffered discrimination. These firms are eligible for the protective reliefs of the Program.

The ability to determine a firm's eligibility to participate in an M/WBE Program through a certification process is fundamental to assuring that a Program is narrowly tailored.

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[6]Faith Ando, *An Analysis of Access to Bank Credit*, Los Angeles: UCLA Center for Afro American Studies, June 1988, p. 20.

Certification (and de-certification) is designed to assure that fraudulent firms are not included in the Program. Removing firms from an M/WBE Program prevents ineligible firms from receiving the protective benefits of the Program, and thus potential burdens are lifted from nonminority-owned firms.

To maintain the integrity of an M/WBE Program, administrators must monitor the eligibility status of firms that receive contracts and be prepared to remove (de-certify) ineligible firms that are operating under the protections of the Program. Failure to establish a monitoring system capable of identifying and removing such firms may well render the Program unconstitutional and expose the local government to litigation and damages resulting from claims from firms denied contracts that were let to ineligible firms.

Impacts of Decentralization: Certification is Expertise-Requisite

Decentralization of the purchasing function places tremendous strains on school resources and local management. With a decentralized purchasing arrangement, local schools would also be responsible for administering a certification process. Certification is a complex process, involving legal and technical expertise. Local schools do not posses the time, skills or resources necessary to conduct an efficient and legal certification process.

Without a certification process, again the legal status of the District's M/WBE Program becomes questionable. Because certification represents the ability for a government to limit the protective benefits of set-asides to those classes of businesses that have been found to have been discriminated against, a strong and efficient certification process is vital to maintaining the narrowly tailored remedies of the District's M/WBE Program.

Flexibility

In the context of an M/WBE Program, the concept of "flexibility" is similar to the concept of narrowly tailored remedies. Flexibility ensures that the policies put forth in an M/WBE Program must be administered in such a way as to establish M/WBE utilization goals rather than quotas. Policy flexibility is critical to a Program's constitutional standing. If policies are administered without the ability to allow for implementation strategies designed to fit the availability of qualified M/WBEs in the local market, then a Program will not be found to be operating "flexibly", and thus may not be operating legally.

To guarantee access to contracting opportunities, the District has included several flexible measures that are designed to increase M/WBE participation in purchasing. Of specific interest to concerns relating to the decentralization of purchasing is the District's policy of setting contract-specific M/WBE utilization goals by commodity/service category. To assure that these goals remain flexible in their administration, the District has included a waiver provision by which vendors may reduce M/WBE utilization rates or waive utilization goals altogether.

Flexibility and the District's M/WBE Program

Waivers

Contracts are let with specific M/WBE utilization goals which may be waived due to one of two conditions of availability: 1) an insufficient number of M/WBEs are interested in performing work on the contract, or 2) an insufficient number of M/WBEs are in existence to perform the work at the predetermined level of involvement.

Applications for waivers are evaluated by a Waiver Committee consisting of representatives from the Bureau of Affirmative Action, the Law Department, and the Chief Financial Officer. An evaluation of the validity of the waiver request is made by analyzing the "good faith efforts" of the vendor seeking the waiver. This evaluation requires a detailed cost and M/WBE availability analysis based on knowledge of industry-specific price structures, and a cross-referencing of all of the District's vendor lists in order to determine the legitimacy (on matters of fact) of the waiver request. The process is both labor- and skill-intensive.

Competitive bidding is a set of rules that binds vendors and the government agency to a process that determines how competition will take place for the right to secure a contract. In operating a competitive bidding process, administrators must be versed in contract law, and the entire competitive bidding process must be structured to guarantee fair competition. There are serious ramifications involved with the granting (or not granting) of a waiver request. Issues of due process are involved, as a firm's alleged right to a contract is being decided.

Local schools operating as stand-alone entities are not in a position to undertake an M/WBE Program that is flexible and observes the requirements of due process. Competitive bidding and waiver designations require a level of managerial and legal expertise that is beyond the resources of a typical school. Therefore, a local school cannot operate a competitive bidding process, let alone a legal M/WBE Program.

Impacts of Decentralization: Flexible Policies Are Expertise-Requisite

The ability to set contract-specific goals by commodity/service category allows the District to set higher (or lower) M/WBE utilization goals for a given contract, depending on the number of available and qualified M/WBEs that exist in a given industry. This process itself is "flexible" in that it steers away from the use of across-the-board M/WBE utilization goals for all contracts, regardless of available M/WBEs. Moreover, the ability to set contract-specific utilization goals depends on the ability for the contracting government to grant or not grant utilization waivers. The waiver process is critical to the administrative flexibility of goal-setting policy.

Local schools do not contain the requisite legal and procurement expertise to determine contract-specific M/WBE utilization goals (in a justifiable manner, based on market

conditions), nor do they possess the capacity to operate a legal waiver process. Decentralization of the purchasing process would place these functions at the local level. However, as a local school would not be likely to be in a position to perform the duties called for under these policies, a local school would probably opt not to try. Clearly, without these policies, the District's M/WBE Program would not be operating in a "flexible", and thus constitutional, manner.

SUMMARY

To be successful, the shape and contour of M/WBE Programs must closely fit the shape and contour of the purchasing processes over which they are imposed. In addition, contemporary M/WBE Programs are highly constrained in their use of race- and gender-based remedial policies by Supreme Court and federal court rulings. Together, these two constraints -- the shape of the purchasing process and previous court rulings on Program constitutionality -- have real impact on the current discussion of decentralization of purchasing at the Chicago Public Schools.

As stated, court rulings have stipulated that in order for an M/WBE Program to be found constitutional, that Program must include race- and gender-neutral policies, be narrowly tailored, and be administered in a flexible manner. These parameters are all highly dependent on the organizational characteristics of a centralized purchasing process. These policies are also highly dependent on scale economies and advanced professional purchasing expertise in order to be operated. Scale economies and professional purchasing staff are possible, not in a decentralized purchasing arrangement, but rather in a centralized one.[7]

An increase in the level of decentralized purchasing at the District may well strain the ability of the District as a whole (let alone any one given school) to continue to operate the necessary policies that are a part of the M/WBE Program. Without such policies in operation, the District's M/WBE Program as a whole would be operated under questionable legal status.

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[7]Joseph S. Moag, Susan E. Nicol, and Nikolas C. Theodore, *The Limits of School-Based Procurement: Cost and Quality Inefficiencies at the Chicago Public Schools*, Chicago Urban League, September 1992.

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